IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISIDICTION

WRIT PETITION NO.4148 OF 1996

M.G.Bhide, 333, Narayan Peth, PUne-411030]..Petitioner

Vs.

1. M/s. Britannia Industries Ltd. Reay Road (East Mazgaon) Mumbai-400010]
2. Mayur Trading Company, Shankar Sheth Road, Near St.Joseph Technical School, Pune-411001]
3. Mr.S.S.Hirurkar, Member Industrial Court, Pune]..Respondents

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Ms.Meena Doshi for Petitioner
Mr.C.J.Sawant Senior Counsel with Mr.Vijay Patil for Respondent no.1
Mr.K.K.Thakkar for Respondent no.2 (absent)

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CORAM : B.H.MARLAPALLE,J.

DATE OF RESERVING THE JUDGMENT : MARCH 14,2005
DATE OF PRONOUNCING THE JUDGMENT: MARCH 23,2005

JUDGMENT:

1. This petition though filed under Articles 226 and 277 of the Constitution of India, prays for quashing and setting aside the judgment and order dated 25.4.1996 passed by the learned Member of the Industrial court at Pune in Complaint (ULP) No. 416 of 1996 and it further prays for a declaration that the petitioner was the workman of the

respondent-company and for a further declaration that he was a permanent employee entitled for a consequential benefits of wages and other allowances. If regards be had to the reliefs prayed for and the law laid down in *Lokmat Newspapers Private Limited Vs. Shankarprasad, [AIR 1999 S.C. 2423],* it is clear that the petition is one under Article 227 of the Constitution. Brief facts leading to this petition could be stated as under:

. Complaint (ULP) No. 416 of 1992 came to be filed by the petitioner before the Industrial Court at Pune under Item Nos. 5,6,9 and 10 of Schedule IV of the MRTU and PULP Act, 1971 (the Act for short) praying for declaration that the respondent no.1 company had engaged in acts of unfair labour practices and that the complainant was permanent employee of respondent no.1 from 1.7.1997. He had claimed that he was appointed as a salesman by the respondent no.1 on 1.7.1986 but no appointment order was issued to him, though he was in continuous employment till the date of filing of the complaint on a monthly salary of Rs.1200/- and other allowances to defray the expenses of conveyance. He further claimed that he was working at Pune under the strict control and supervision of the respondent no.1 and he was required to visit various shops in the areas allotted and to book the orders. He alleged that his salary

was paid by the first respondent through the second respondent who was the agent of the first respondent company. He claimed that he was entitled for permanency from 1.7.1987 under the Model Standing Orders and by not doing so the respondent no.1 had engaged in acts of unfair labour practices under Item Nos. 9 and 10 of Schedule IV of the Act. By denying the payment of other benefits available to a salesman, the company had engaged in acts of unfair labour practice under item 6 of the Schedule IV of the said Act. The other employees working as salesmen have been given the benefits of D.A., H.R.A. and L.T.C. etc. under the various settlements. The respondent no.1 discriminated the complainant and thus showed partiality and favouritism to other employees regardless of merits. On this count, unfair labour practices under item no.5 of Schedule IV of the Act, was alleged.

2. The respondent nos.1 and 2 filed separate written statements and opposed the complaint. The respondent no.1 had raised the following issues in its written statement.

(a) The complainant was not an employee of the respondent no.1 and therefore, the complaint was not tenable ?

(b) The complainant was not ‘workman’ as defined under the Industrial Disputes

Act, 1947 and therefore, he was not an 'employee' as defined under Section 3(5) of the Act. He was therefore, not entitled to approach the Industrial Court by filing a complaint of unfair labour practices.

(c) There were certain other persons who offered their services as supplements as and when necessary and were paid lumpsum for such services. The complainant was one of such persons and the respondent no.1 used to avail of his services time and again though no letter of appointment was issued to the complainant and he had rendered some services to the respondent.

. On merits, it was contended that at no point of time, the complainant had raised the grievances before he approached the Industrial Court and thus the complaint was filed with an ulterior motive after he had started working with M/s. Ashok Agency the Distributor of Cadburry Ltd., since the 2nd week of December, 1992. The complainant was not entitled for the benefits available to the regular employees of the respondent since the complainant was not its regular employee.

. The complainant examined himself as UW-1 whereas the respondent no.1 examined Mr.Ashok Manikrao Akolkar C.W.1 and Mr.Raghunath Tukaram Idate as C.W.2 and Vijay Mehta, Partner of Vardhaman Distributors as CW-3. Respondent no.2 examined Mr.Sharad Shah its partner. The Industrial Court framed the following issues and answered them accordingly:

Sr. No.	Issues	Findings
1.	Whether the complaint is maintainable ?	No
2.	Does the Complainant prove that he is employee of respondent no.1 and/or respondent no.2 ?	Respondent No.2
3.	Does the Complainant prove that he was in the employment of respondent no.1 and/or respondent no.2 at the time of filing of the complaint ?	No
4.	Whether the complaint is barred on the ground of limitation ?	No
5.	Does the Complainant prove that respondents have committed acts of unfair labour practices by keeping him as temporary or casual for more than five years in breach of Model Standing Orders with a view to deprive him of benefits of permanency ?	No
6.	Does the complainant prove that the respondents have committed an act of unfair labour practice under Item 5 of Schedule IV of the Act by not extending the wages benefits and other service conditions applicable to similar other permanent employees ?	No
7.	What acts of unfair labour practice have been proved against the respondents ?	Nil
8.	Whether the complainant is entitled to get any relief ?	No

3. Mrs.Doshi, the learned counsel for the petitioner

at the threshold referred to the written statement filed by the respondents and the contradictory oral evidence as recorded through their witnesses inasmuch as in its written statement the respondent no.1 had accepted that the complainant had worked for it for sometime but has supplementary and not as a regular employee. Whereas, in the oral evidence before the Industrial Court the said respondent no.1 took the plea that the complainant was an employee of respondent no.2. On the other hand, respondent no.2 in its written statement denied that the complainant was working for it but its witness before the Industrial court stated that the complainant was working for the said Agency from 1989 and he started working with Cadburry since October, 1992 without tendering his resignation from the employment of respondent no.2. By referring to the documents placed on record vide lists at Exh.U-4 and U-13-A, she submitted that these documents were duly proved and they went to establish the employee-employer relationship between the complainant and respondent no.1. As per the learned counsel for the petitioner, the Industrial Court fell in gross errors in appreciating the evidence on record and it ought to have held that the complainant was the employee of respondent no.1 and not respondent no.2. Once this conclusion would have been recorded, the consequent order of granting reliefs as available to the

employees of the respondent no.1 would flow. In short, the petitioner contends that the evidence on record before the Industrial Court went to prove that he was an employee of respondent no.1 and therefore, he was entitled for a declaration that he was a permanent employee eligible for the consequential benefits as available to the regular salesman of respondent no.1.

4. Mr.Sawant, the learned senior counsel appearing with Mr.Patil for the respondent no.1 submitted that the Industrial Court had rightly appreciated the evidence and held that there was no employee-employer relationship between the complainant and respondent no.1 and that in fact, the complainant was the employee of respondent no.2. The fact finding exercise done by the Industrial Court does not call for any interference under the supervisory powers of this Court and in any case, the evidence recorded by the Industrial Court cannot be reappreciated in this petition. The Industrial Court has taken a possible view on the basis of evidence recorded before it and therefore, there is no case made out for interference under the supervisory powers of this Court. The petitioner was holding the qualifications of B.Sc. at the relevant time and it cannot be accepted that he worked without any appointment letter for about more than six years. The respondent no.1 was not the

employer of the complainant and indeed, it was not responsible for payment of his salary and other monetary benefits, the petitioner could not bring on record that he was granted benefits like leave or he was signing the muster roll maintained by the respondent no.1 nor was there any evidence to show that the supervision and control in respect of the complainant was exercised by respondent no.1. It was further contended that the Industrial Court ought to have framed the additional issue regarding the status of the complainant as an 'employee' within the meaning of Section 3(5) of the Act and the evidence on record both the oral and documentary, went to prove that the complainant was not an employee, even if it was presumed that he was working for the respondent no.1 and the documents placed on record by the complainant were also taken into consideration.

5. In the case of *Waryam Singh Vs. Amarnath (1954 SCR 565),* the Supreme Court held that the power of superintendence conferred by Article 227 of the Constitution of India is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting the mere errors. In *Bhahutmal Raichand Oswal Vs. Laxmibai R.Tarta (AIR 1975 SC 1297)*, it has been held that the High Court could not under the guise of the exercise

of its jurisdiction under Article 227 of the Constitution of India, convert itself into a Court of appeal when the Legislature has not conferred a right of appeal.

. In the case of *M/s. Essen Deinki V. Rajiv Kumar (JT 2002 (8) SC 471),* Their Lordships stated thus:

> . "Generally speaking the exercise of jurisdiction under Article 227 of the Constitution of India is limited and restrictive in nature. It is so exercised in the normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the Courts below. The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof, or not based on any material whatsoever resulting in manifest injustice, interference under the Article is not called for".

. In the case of *Surya Dev Rai Vs. Ram Chander Rai (2003) 6 SCC 675,* powers of certiorari as well as supervisory jurisdiction of the High Court have been explained as under:

> (a) To be amenable to correction in certiorari jurisdiction, the error committed by the Court or authority on whose judgment the High Court was exercising jurisdiction should be an error which is self-evident. An error

which needs to be established by lengthy and complicated arguments or by indulging in a long drawn process of reasoning, cannot possibly, be an error available for correction by a writ of certiorari;

(b) If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be faulted with as a patent error.

(c) The jurisdiction to exercise supervisory powers is not available for indulging in reappreciation or evaluation of evidence or correcting the errors in drawing inferences like a Court of appeal".

. On the touchstone of the above enunciations regarding the powers of this Court, the challenge to the impugned decision of the Industrial Court has to be tested.

6. The foundation of the impugned order passed by the Industrial Court, has been set out in para no.13 therein and which reads as under:

. " It was the case of the respondent that the complainant was working as a salesman with the respondent no.2, who was the distributor of respondent no.1 and the complainant was never the employee of respondent no.1. Therefore, the burden lies on the complainant to prove that he is the employee of the respondent no.1 and there is employer-employee relationship between the respondent no.1 and therefore, the complaint is tenable. If the complainant succeeds to prove that he is the employee of respondent no.1 and his complaint is

> tenable against the respondent no.1, then only the complainant would be entitled to get the further reliefs".

. The Industrial Court on considering the evidence of the respective parties held that the complaint was not maintainable and the complainant was not employee of the respondent no.1 and on the contrary, he was employee of respondent no.2. It further held that the complainant was not in the employment of either of the respondents as on the date of the filing of the complaint. If the evidence adduced by the complainant and the contentions raised by the respondents in their respective written statements, do not support the findings on issue nos.1 and 2 as framed by the Industrial Court, surely there is every reason for this Court to interfere in the impugned decision. In addition, on the basis of the averments made by the respondent no.1 in its written statement, it was necessary for the Industrial Court to frame an additional issue as to whether the complainant was an employee within the meaning of Section 3(5) of the Act (of respondent no.1) and as the Industrial Court failed to do so, it is necessary to decide the same issue in this petition on the basis of documentary and oral evidence available on the record.

7. The evidence on record shows that the respondent

no.2 is one of the two authorised distributors of respondent no.1 at Pune. In the written statement filed by respondent no.1 before the Industrial Court, it was not the case of respondent no.1 that the complainant was the employee of respondent no.2 and there was no employer-employee relationship between itself and the complainant. The written statement accepted that the complainant was working for respondent no.1 for sometime in some capacity or the other but not as a regular employee and he was amongst certain other persons who had offered their services as the supplement as and when necessary on lumpsum payments for such services. The respondent no.2 on the other hand, had clearly denied that the complainant was its employee and on that ground alone, it had contended that the complaint was required to be dismissed against the respondent no.2 or the name of respondent no.2 was required to be deleted. Strangely it was only through the evidence of CW-1 Ashok Manikrao Akolkar and CAW-1 Shri. Sharad Shah-the partner of respondent no.2, it was tried to be contended for the first time, that the complainant was an employee of respondent no.2. Mr.Sharad Shah CAW-1 in his cross-examination by the respondent no.1, stated that the complainant was working with respondent no.2 since 1991 and towards the end of October, 1992 he left on his own without even submitting the resignation letter. The evidence

of both these witnesses on the point of employer-employee relationship is thus diametrically opposed to what was contended in the respective written statements. It was nobody's case that the complainant was employed by the respondent no.1 through the Contractor or that he was a contract labour as envisaged under the Contract Labour (Abolition and Regulation) Act, 1971.

8. Mr.Sawant, the learned Senior Counsel relied upon the decision in the case of *Vividh Kamgar Sabha Vs. Kalyani Steels Ltd. and Anr. [2001 (1) CLR 532] and Cipla Ltd. Vs.Maharashtra General Kamgar Union and Ors. [2001 (I) CLR 754].* In both these cases, the workmen were employed through the contractors. In the case of *Cipla Ltd.*, Their Lordships stated as under:

. "In the cases at hand before us, whether a workman can be stated to be the workman of the appellant establishment or not, it must be held that the contract between the appellant and the respondent is a camouflage or bogus and upon such a decision it can be held that the workman in question is an employee of the appellant establishment."

. In the case of *Vividha Kamgar Sabha (supra)*, Their Lordships observed as under:

. "The provisions of MRTU and PULP Act can only be enforced by persons who admittedly are workmen. If there is dispute as to whether the employees are employees of the company, then that dispute must first be got resolved by raising a dispute before the appropriate forum. It is only after the status as a workman, is established in an appropriate forum, that a complaint could be made under the provisions of MRTU and PULP Act."

9. Admittedly, the complainant did not possess any appointment order, leave record, leave sanctioned order, salary slip, provident fund contribution slip, payment of bonus slip or any other order whereby the respondent no.1 had sought to initiate any disciplinary action against him. His evidence also went to show that he was not signing any attendance register maintained by the respondent no.1. The Industrial Court appears to have been overwhelmed by the absence of this documentary evidence so as to hold that the employer-employee relationship between the complainant and respondent no.1 was not established.

. In the case of *Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra and others [AIR 1957 S.C.264]*, a four Judge-Bench considered the question of employer-employee relationship and held that the same is a pure question of fact. It stated further as under:

. "The prima facie test for the determination of relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work. The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary nature incapable of precise definition. The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer. A person can be a workman even though he is paid not, per day but by the job. The fact that Rules regarding hours of work, etc. applicable to other workmen may not be conveniently applied to them and the nature as well as the manner and method of their work would be such as cannot be regulated by any directions given by the Industrial Tribunal, is no deterrent against holding the persons to be workmen within the meaning of the definition if they fulfil its requirement."

. In the case of *Hussein Vs. Alath Factory Tezhilali Union and others, [AIR 1978 S.C. 1410]*, the issue of employer-employee relationship was again considered and the following test was laid down:

. "Where a workman or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers'

> subsistence, skill and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off."

. It is therefore, necessary to evaluate the evidence on the background of the above legal position so as to examine whether the complainant was employed by the respondent no.1.

10. The complainant had consistently stated that he had joined the respondent no.1 as a salesman in July 1986 but he did not possess any appointment order as such an order was not issued to him at any time. He had passed his B.Sc. degree in 1980 from the Pune University. He placed on record two sets of documents with applications at Exh.U-4 and Exh.U-13/A. These documents have been proved through his oral depositions and they were also proved through the evidence of CW-1 Akolkar and CW-2 Idate. The document at Sr.No. U-4/1 is an internal memo addressed by the Assistant Sales Manager of respondent no.1 to the complainant on 17.10.1986 with a copy to CW-1 Akolkar. The complainant was directed to attend to the letter it received from M/s.Ghadge Maharaj Mission. Exhibit-U-4/2 is the order form of the respondent no.1 and prepared by the complainant dated 21.12.1986, Exh-U-4/4 is again the letter by the Area Sales Manager of respondent no.1 addressed to the complainant on 6.7.1987. In the letter at

Exh.U-4/5 dated 31.7.1987 addressed by the respondent no.1 to M/s. Raj Agency at Dehu Road, the complainant has been referred as the Area Salesman of respondent no.1 by its Area Sales Manager at Bombay. Exh.U-4/9 is another letter dated 31.8.1990 addressed by the Area Sales Manager of respondent no.1 to the complainant regarding the application of M/s. Bafna Agency of Jalna. Exh.U-4/12 is the expenses report for October 1992 submitted by the complainant to the respondent no.1. In the letter dated 31.7.1987 at Exh.U-13-A/3, the Area Sales Manager of respondent no.1 has referred to the complainant as the Company's Area Salesman. The other documents are regarding minutes of the meeting, training programme attended by the salesmen and in all these documents the name of the complainant figures. The second witness of the respondent no.1 Mr.Raghunath Idhate admitted in his cross-examination before the Industrial Court that except the employees of the respondent no.1 Company, nobody was called for training programmes and in all these documents placed on record regarding the training programms conducted, the name of the complainant appeared as one of the participants. This documentary evidence went to prove without any doubts that the complainant was working as a salesman of respondent no.1 at least upto October 1992. No doubt, the complainant in his cross-examination before the Industrial Court admitted as under:

. "Respondent no.2 is situated at Shankar Sheth Road, I used to report at 9.00 a.m. every day at respondent no.2. Respondent no.2 was not allocating the work. It is true that propaganda material was provided to me which was available with respondent no.2. There are about 180 distributors of respondent no.1 in Maharashtra. There are two distributors in Pune namely respondent no.2 and Meera Agencies. I did not join respondent no.2. I started reporting at respondent no.2 from January, 1991."

. In his cross examination, he has further stated that "he was reporting as a salesman from January 1991 to respondent no.2.... I was going to respondent no.2 as a salesman of the respondent no.1."

. This reporting for work of complainant to respondent no.2 would not by itself prove that he was working with respondent no.2. Shri.Akolkar, the first witness of respondent no.1, admitted in his cross examination that the salesmen of respondent no.1 used to go to the market directly or report to the distributors and if required with the company vehicles of respondent no.2 as well. It is thus clear that even the salesman of respondent no.1 would be reporting to any distributor like respondent no.2 and visit the markets with the vehicle of respondent no.2 or any of his representatives. The complainant

was reporting to respondent no.2 in 1991 onwards will have to be read in this context and his depositions as quoted hereinabove, cannot be an admission for being held that he was an employee of respondent no.2. Shri.Akolkar the first witness of respondent no.1 stated that the complainant was not employee of the same company but, as noted a little while ago, this statement contrary to the stand taken by the company in its written statement and therefore, the evidence of Mr.Akolkar denying the employer-employee relationship is required to be discarded. The complainant by bringing on record the documents along with Exh.U-4 and U-13/A discharged the burden to prove that he was working as a salesman of respondent no.1. It is not necessary that such a relationship will be only as a regular employee. It is possible that he was engaged on a lumpsum monthly payment in addition to the reimbursements of actual expenses. The findings recorded by the Industrial Court that he was an employee of respondent no.2 is solely based on the oral evidence of Mr.Akolkar and Mr.Sharad Shah the partner of respondent no.2. This oral evidence was not supported by any documentary proof and was contrary to the stand taken by both the respondents at the threshold by filing written statement. The findings of the Industrial Court on issues nos.1 and 2 are therefore, required to be discarded as they are not based on evidence and infact, they are contrary

to the evidence. The findings are nothing short of perverse conclusions reached by the Industrial Court.

11. The next issue that arises for consideration is whether the complainant was an employee within the meaning of Section 3(5) of the Act and the Industrial Court was required to frame and decide the same issue on the face of the written statement submitted by the respondent no.1. It appears that the Industrial Court did not deem it necessary to frame such an issue for the reasons that the employer-employee relationship was denied by the respondent no.1. This approach is grossly erroneous. Once the findings of the Industrial Court on the employer-employee relationship vis-a-vis respondent no.1, have been discarded, the findings on this issue are necessary on the basis of the evidence that has been placed before the Industrial Court by the respective parties.

. The compalinant himself claimed that he was working as a salesman under respondent no.1 and therefore, whether he falls within the ambit of the term "workman" as defined under Section 2(s) of the Industrial Dispuets Act, 1947 is the moot question. Section 3(5) of the Act and Section 2(s) of the Industrial Disputes Act, read as under:

. "3.(5) "employee" in relation to an industry to which the Bombay Act for the time being applies, means an employee as defined in clause (13) of section 3 of the Bombay Act; and in any other case, means a workman as defined in clause (s) of section 2 of the Central Act.

. 2(s). "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, techncial, operational, clerical or supervisory work for hire or reward, whether the terms of employment be epxress or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such pesron who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-"

12. It is pertinent to note at this stage that Section 3(5) of the Act has suffered amendment in 1999 by the State Govt. and the said amendment is not applicable to the instant case as the cause of action has arisen in December, 1992.

. In the case of *H.R.Adyanthaya Vs. Sandoz (I) Ltd. AIR 1994 SC 2608,* the Supreme court considered the definition of the term "workman" under Section 2(s) of the Industrial Disputes Act and held that a person to be a workman under the I.D.Act must be employed to do the work of any of the categories viz. manual unskilled or skilled, technical, operational,

clerical or supervisory and it is not enough that he is not covered by either of the four exceptions to the definition. The said decision was again considered in the case of *Mukesh Tripathi Vs. Senior Divisional Manager, L.I.C. and others; [2004 (8) S.C.C. 387]* and in para 36, the Court stated,

> . " A "workman" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 must not only establish that he is not covered by the provisions of the Apprentices Act but must further establish that he is employed in the establishment for the purpose of doing any work as contemplated in the definition."

. It further stated that the 'workman' defined under the Industrial Disputes Act, 1947, must conform to the requirements laid down therein meaning thereby, inter alia that he must be working in one or the other capacities mentioned therein and not otherwise.

. In the case of *Management of M/s. Sonepat Corporation Sugar Mills Ltd. V/s. Ajith Singh [J.T. 2005(2) SC 307],* the employee was holding the post of Legal Assistant and he contended that he fell within the ambit of the term "workman" as defined under Section 2(s) of the I.D.Act. The Supreme Court rejected his contention and reiterated that the employee must be doing the work of any of the category set out therein and not otherwise.

13. In the instant case, the complainant described his duties in his written statement as well as oral evidence as under:

1) To visit the parties and report their complaints to the Bombay Office;

2) To obtain orders from the Shop Keepers;

3) To enquire into the causes of bouncing of cheques drawn in favour of respondent no.1, in case it so happens;

4) To check the age of stock with the retailers and cause to destroy the expired stock during the visits to the shop; and

5) To send monthly reports to respondent no.1 at Mumbai.

. C.W.-1 Shri.Akolkar also in his oral depositions described the duties of the salesman employed by respondent no.1 as under:

. "It is true that the salesman of respondent no.1 do not pay visit on door to door basis to the customers. It is true that their job is to check the stocks with the retailers and find out the demand position for various Biscuits and book the orders. The salesman of the respondent no.1 may go to the market directly or may report to the distributor. The salesman of respondent no.1 if required, accompanies the vehicle of respondent no.2. It is true that when demands are not received from the parties, the

salesman follows up the matter".

. The above stated duties do not fall in any of the categories like manual skilled or unskilled, technical, clerical or supervisory as contemplated within the meaning of Section 3(5) of the Act. The category of "operational" subsequently included by the amendment of 1999 by the State Govt. cannot be taken into consideration for the case at hand. The evidence thus, adduced by the complainant and the respondent no.1 clearly went to establish that the complainant was working as a salesman under respondent no.1 and his duties were not included in any of the categories like manual, clerical, technical and supervisory. He was therefore, out of the purview of the term "employee" as defined under Section 3(5) of the Act and thus, was not eligible to move the complaint of unfair labour practice before the Industrial Court under Section 28 of the Act against the respondent no.1. The complaint was required to be dismissed by the Industrial Court on this ground alone.

14. The third important issue requiring consideration is whether the complainant was working under respondent no.1 as on the day he had moved the complaint i.e. 4.12.1992. This issue has been answered in the negative by the Industrial Court

after considering the evidence on record. The learned counsel for the complainant submitted that this finding is erroneous. There is no dispute that on 8.12.1992 an interim order was obtained exparte by the complainant on his application under Section 30(2) of the Act. In his cross-examination before the Industrial court, the complainant admitted that the said order was served on the respondent no.1 but he did not insist for its enforcement nor did he file any criminal complaint against any of the officers of the said respondent company under Section 48 of the Act for failure to implement the said order. He admitted that as on 15.12.1992 he was not in the employment of the respondent no.1 and infact, he had already joined Ashok Agency at Pimpri on a monthly salary of Rs.1500/- and this Ashok Agency was the distributor of M/s. Cadburry Indian Ltd. The documentary evidence placed on record by the complainant went to show that beyond October, 1992 he did not work for respondent no.1 as the last document he had brought on record was pertaining to month of October, 1992. The evidence of CW-3 Mr.Vijay Mehta, the partner of Vardhaman Distributors, requires to be considered in this regard. M/s. Vardhan Distributors were in the business of selling consumer items of Wipro, Cadburry, Marico and Amol etc.at Pune. His firm was a distributor of the products manufactured by Cadburry since 1992. He stated that

the complainant started approaching M/s. Vardhaman Distributor on behalf of Cadburry Company in October, 1992 itself. In the cross-examination, he reiterated that the complainant was working for Cadburry during the period from October to December, 1992. However, so far as the month of October, 1992 is concerned, the complainant has placed on record the document at Exh.U-4/12 showing the statements of expenditure for that month and therefore, it will have to be accepted that for the same month, he worked for respondent no.1. But his contention that he worked for respondent no.1 for November and December, 1992 cannot be supported by any documentary evidence and his actions of approaching the Court and obtaining exparte ad-interim order indicated that he was no more working for the same company when he had filed the complaint.

. The substantial prayer in the complaint read as under:

> . "It be declared that the complainant is the permanent employee of respondent no.1 from 1.7.1986 and further the respondent no.1 be directed to pay him benefits of wages and all other allowances as applicable to his co-workman."

. It is apparent that the complainant did not seek

the relief of reinstatement in service, even though he admitted that he was not in employment under respondent no.1 from 15.12.1992. The complaint was not amended at any time if there was termination of his service after the complaint was filed. In his oral depositions, he admitted that he had not resigned and there was no necessity to do so because there was no appointment order in his favour. Under the circumstances, the findings recorded by the Industrial Court on this issue do not call for any interference.

15. In the premises, it is held that the complainant was working under respondent no.1 at least till October, 1992 but he was not an employee within the meaning of Section 3(5) of the Act of the said Company and hence, the complaint filed by him i.e. complaint (ULP) NO.416 of 1996 before the Industrial Court at Pune was not maintainable and the Industrial Court ought to have dismissed the complaint. As on the day, the complaint was filed, the complainant was not working for respondent no.1.

. In the result, this petition fails and the same is hereby dismissed, consequently complaint (ULP) No.416 of 1996 stands dismissed as not maintainable.

16. Rule discharged with no order as to costs.

[B.H.MARLAPALLE, J.]